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In The

Supreme Court of the United States

October Term, 1997

PETER D. BOGART, et al.,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Two

RESPONDENT CALIFORNIA COASTAL COMMISSION'S BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the challenged state court decision is supported by a fully adequate and independent basis in state law – that Petitioners' action is barred by the doctrine of unclean hands?

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RESPONDENT CALIFORNIA COASTAL COMMISSION'S BRIEF IN OPPOSITION TO PETITION

Respondent California Coastal Commission ("Coastal Commission") respectfully requests this Court to deny the petition for writ of certiorari seeking review of the opinion of the California Court of Appeal. Citations herein will be to the opinion as it is reprinted at Appendix A to Petition for Writ of Certiorari (hereinafter "Pet., App. A").

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. section 1257(a). Jurisdiction, however, is lacking because the state court judgment is supported by an adequate and independent state law ground.

RELATED PETITION

Simultaneously with the instant petition, Petitioners filed a petition for writ of certiorari in related litigation. (*Ojavan Investors, Inc., et al. v. California Coastal Com.*, Supreme Court Docket No. 97-621.) The petitions are related because they both arise from the same factual circumstances.

REASONS FOR DENYING THE WRIT

The writ should be denied because the state court decision is supported by a fully adequate and independent basis in state law as embodied in the doctrine of unclean hands.

The instant action represents the *sixth* failed action filed by Petitioners Peter D. Bogart and his sham corporations arising from the California Coastal Commission's successful enforcement of two coastal development permits through its statutory cease and desist powers. The state and federal courts dismissed all six actions and the state court issued a decision specifically holding that *all* constitutional and other challenges to the subject permits, and the cease and desist order thereon, are barred by well-settled limitations and waiver principles. (*Ojavan Investors, Inc. v. California Coastal Com.*, 26 Cal.App.4th 516, 32 Cal.Rptr.2d 103 (1994), *cert. denied*, 513 U.S. 1148 (1995) (hereinafter *"Ojavan I"*).) The state court also granted the Coastal Commission affirmative relief in the form of a civil fine and a permanent injunction that requires Petitioners to rescind their illegal land sales and pay restitution to the defrauded third party purchasers. (*Ojavan Investors, Inc. v. California Coastal Com.*, 54 Cal.App.4th 373, 62 Cal.Rptr.2d 803 (1997) (*"Ojavan II"*).)

In related proceedings, the state court, on three separate occasions, held Petitioners in contempt of court for their unexcused refusal to comply with the permanent injunction. That contempt sanction has, in turn, resulted in the issuance of a bench warrant for Petitioner Bogart's arrest. Based on these and other facts, the state court

properly held that Petitioners "have unclean hands," thus barring their latest lawsuit.

STATEMENT OF THE CASE

Though the Statement of the Case is lengthy and complex, it is nonetheless necessary for a complete understanding of Petitioners' unsuccessful and frivolous six year battle against the Coastal Commission and the Commission's successful litigation under the Coastal Act. Many of the underlying facts have already been determined conclusively in the Coastal Commission's favor in *Ojavan I, supra,* 26 Cal.App.4th 516. Accordingly, where appropriate, the Coastal Commission will base factual references on the appellate record and/or the related *Ojavan I* decision.

A. The Underlying Facts

The Coastal Act of 1976, Public Resources Code sections 30000 *et seq.* ("Coastal Act"), "shall be liberally construed to accomplish its purposes and objectives." (Pub. Resources Code § 30009.) One such objective is to " '[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.' " (*Ojavan I, supra,* 26 Cal.App.4th at 520, quoting Pub. Resources Code § 30001.5, subd. (a).) To satisfy this objective, the Coastal Commission established the Transfer of Development Credits Program ("TDC Program"). Under the TDC Program, new subdivisions and development projects in Malibu and the Santa Monica Mountains are approved

"on the condition that the project proponents arrange to extinguish, either by direct purchase or through involvement in government programs, the development capacity of other lots." (*Ibid.*) "The TDC Program thus conditions the issuance of coastal development permits on the extinguishment of development rights as to other building sites in the coastal zone, either by offering to dedicate a scenic easement or by filing declarations of restrictions, thereby waiving development rights and unifying separate lots into one parcel." (*Ibid.*) This litigation arises from the Coastal Commission's enforcement of two coastal development permits issued under the TDC Program.

On December 19, 1979, and May 10, 1990, the Coastal Commission issued coastal development permits to David Leanse and Larry Thorne ("permits"), respectively, for condominium and housing developments in the Malibu area within the coastal zone. (*Ojavan I, supra,* 26 Cal.App.4th at 521.) Messrs. Leanse and Thorne are not and have never been parties to any litigation between Petitioner Bogart and the Coastal Commission. (*Id.* at 523.) These two projects were not related to each other, but the Coastal Commission found that both projects created risks of adverse cumulative environmental impacts on coastal resources. (*Id.* at 521.) To mitigate such adverse environmental impacts, the Coastal Commission conditioned permit approval on the applicants' participation in the TDC Program. (*Ibid.*) Accordingly, as a condition precedent to issuance of the permits, the applicants agreed that they would provide evidence to the Coastal Commission that development rights for residential use had been extinguished on a specified number of building sites in the coastal zone near the proposed projects. (*Ibid.*)

The permit applicants fulfilled the TDC condition by purchasing, in the private market place, the right to have other, unrelated landowners record documents restricting development on privately owned lots. (*Ojavan I, supra*, 26 Cal.App.4th at 521.) One restriction, known as an Offer To Dedicate a Scenic Easement, extinguished the building rights on the subject lots by transferring such rights to the permit applicants' own properties. (*Ibid.*) The other restriction was embodied in four Declarations of Restrictions which "recombine[d] and unif[ied] the Subject lands into a single parcel for all purposes . . . including but not limited to sale, conveyance, development, taxation or encumbrance [so that] the proposed development is in conformity with the [Coastal] Act. . . . " (*Ibid.*) These declarations expressly state that any violation of the restrictions "shall render the landowners or their successors liable pursuant to the provisions of [the Coastal Act]." (*Id.* at 522.)

Pursuant to their respective agreements with the permit applicants, Petitioners' predecessors in interest recorded the Declarations of Restrictions on their lots between July 1981 and June 1990. (*Ojavan I, supra*, 26 Cal.App.4th at 521.) The result was that the 77 former individual lots were recombined into 2 larger lots. (*Id.* at 522.) Thus, either or both of the 2 newly-recombined lots could be sold, but the former 77 lots could *not* be sold-off individually. (*Ibid.*) Ultimately, the deed restricted lots arising from the separate Leanse and Thorne permit transactions came to be held by a common owner, Dan Bochner. (*Ibid.*)

In February 1991, without the knowledge or approval of the Coastal Commission and in violation of the

permits' restrictions (*Ojavan I, supra,* 26 Cal.App.4th at 522, 525), Petitioners purchased a total of 54 of the 77 deed restricted lots from Mr. Bochner (JA 161-162). Between April 2, 1991, and January 26, 1992, Petitioners sold a total of 19 deed restricted lots to third parties. (JA 162.) In the auction brochure, Petitioners stated:

> "Unbelievably cheap, due to restrictions on development. Economists tell us the government is broke, and only development money can fill the bureaucrats' maws. They'll *have* to develop!" (*Ojavan I, supra,* 26 Cal.App.4th at 522, emphasis original.)

After being alerted to these illegal purchases and sales of the deed restricted lots, Coastal Commission enforcement staff attempted to convince Petitioners to halt their illegal activities and voluntarily correct their violations of the Coastal Act. (*Ojavan I, supra,* 26 Cal.App.4th at 522.) When these efforts proved unsuccessful because Petitioners were intractable, the Coastal Commission was forced to issue both a temporary and a subsequent permanent cease and desist order to prevent a further breach of the Declarations of Restrictions. (*Ibid.*) The permanent order, which is the subject of the instant litigation, states in relevant part:

> "Pursuant to the authority under California Public Resources Code Section 30810, the Coastal Commission hereby orders [Petitioners and others] . . . to cease and desist from undertaking activities or from causing the undertaking of any and all activities which may result directly or indirectly in a violation of the California Coastal Act and specifically to cease and desist from the sale, conveyance or transfer in

> any manner of any interest in the real property described [herein] . . . unless said sale, conveyance or other transfer complies in all respects with the terms and provisions of those certain Declarations of Restriction recorded against said properties. . . . This order shall remain in effect permanently unless and until rescinded by the Commission." (Joint Appendix ("JA") 16.)

B. Litigation History

In July and October of 1992, Petitioners filed two complaints for damages and one petition for administrative mandate in the Los Angeles County Superior Court challenging the permits' deed restrictions, and the Coastal Commission's issuance of cease and desist orders thereon, alleging numerous constitutional and tort claims. (JA 96-117; *Ojavan I, supra,* 26 Cal.App.4th at 523.) The crux of Petitioners' allegations was that the permits' deed restrictions were invalid and could not be enforced. (*Ibid.*)

On the Coastal Commission's motions, the trial court dismissed all three of Petitioners' actions holding that the suits were barred by the Coastal Act's sixty day statute of limitations and by the doctrine of waiver. (JA 162; *Ojavan I, supra,* 26 Cal.App.4th at 523.) Petitioners appealed two of the three dismissals in the related actions, but the Court of Appeal unanimously affirmed the trial court's judgments. (*Ojavan I, supra,* 26 Cal.App.4th 516.) Finally, this Court denied Petitioners' petition for a writ of certiorari. (*Ojavan I, supra,* 513 U.S. 1148.)

In the first state court suit filed by Petitioners, the Coastal Commission filed and successfully litigated a

cross-complaint for violations of the Coastal Act. (JA 123-141.) On the Coastal Commission's motion for issue sanctions, the court pierced the corporate veil, thus finding Petitioner Bogart personally liable for each of the 73 violations committed by his corporations. (JA 166.) As relief, the court issued a permanent injunction that requires Petitioners to rescind each of the illegal sales of the deed restricted lots and make monetary restitution to the third party purchasers. (JA 155-157.) The court also imposed a civil fine. (JA 156-157.) On April 17, 1997, the appellate court affirmed the judgment in its entirety. (*Ojavan II, supra,* 54 Cal.App.4th 373.)

On August 29, 1994, Petitioners filed a fourth suit against the Coastal Commission – this time in the Ventura County Superior Court – wherein they again challenged the constitutionality of the permits' deed restrictions and the Coastal Commission's permanent cease and desist order. (JA 143-149.) The only new element in the Ventura suit (and which reappears in the instant action) was the allegation that the Coastal Commission, upon written request, had the absolute duty to consider in a formal hearing Petitioners' argument that the cease and desist order should be modified or rescinded altogether. (JA 145-146.) On September 12, 1994, after a hearing on the merits of the mandate petition, the trial court dismissed the action and imposed monetary sanctions on Petitioners and their counsel for filing a frivolous suit. (JA 151-152.) The court explicitly held, *inter alia,* that Petitioners "have not met their burden of proof" to support their allegation that the Coastal Commission abused its discretion in refusing to revisit, in a formal administrative hearing, the

cease and desist order. (JA 152.) Petitioners never appealed this decision.

After dismissal of Petitioners' fourth suit, and after Petitioners failed to comply with the permanent injunction, the state trial court issued an order to show cause re contempt and set a hearing for January 31, 1995. (JA 178.) In order to prevent the contempt hearing from going forward, Petitioners filed a new and separate federal lawsuit on January 9, 1995, against the Coastal Commission and the Superior Court pursuant to 42 U.S.C. section 1983, praying for injunctive and declaratory relief. (JA 189-206.) After full briefing by all the parties, the United States District Court for the Central District of California granted the Coastal Commission's motion to dismiss the federal lawsuit. (JA 208.) The court also granted the Coastal Commission's motion for Rule 11 sanctions of $9,975 against Petitioners and their counsel, the law firm of Fosbinder & Fosbinder, which also represents Petitioners in the instant litigation. (JA 209.) By memorandum opinion dated September 12, 1996, the United States Court of Appeals for the Ninth Circuit affirmed the sanctions order. (*Ojavan Investors, Inc. v. California Coastal Com.*, 97 F.3d 1460 (9th Cir. 1996) (unpublished disposition).) That federal litigation is now final.

C. The Instant Appellate Decision

As with the failed Ventura County action described above, the instant action arises from Petitioners' allegation that, notwithstanding the numerous adverse rulings and contempt citations, the Coastal Commission is *required* to revisit its issuance of the cease and desist

order upon Petitioners' written request. (JA 5.) Specifically, on September 13, 1995, Petitioners "made a written application and request for modification, rescission and cancellation of the [cease and desist] ORDER, pursuant to Title 14, section 13188(b) of the California Administrative Code." (JA 4.) That section provides in relevant part that "a hearing on the request shall be held at the next regular scheduled meeting or as soon thereafter as is practicable after notice. . . . " By letter dated October 17, 1995, the Coastal Commission, by and through its counsel, denied the application as "inappropriate" for many reasons, including the fact that the state and federal courts had repeatedly rejected all of Petitioners' arguments in support of their request to modify or rescind the cease and desist order and underlying permits. (JA 4-5, 48-50.) In the same letter, the Coastal Commission also warned Petitioners that if a "sixth action [is] filed against the Coastal Commission, . . . [the Attorney General's] office will act appropriately to protect the Coastal Commission and its interest, including seeking any relief [California Code of Civil Procedure] section 128.7 may afford." (JA 50.) Despite this warning, Petitioners filed yet another state court lawsuit on December 15, 1995. (JA 1.)

On March 11, 1996, the Coastal Commission filed a general demurrer arguing that the court should dismiss the action with prejudice. (JA 78-89, 92-212.) The Coastal Commission also filed a separate motion for the imposition of $1,127 in California Code of Civil Procedure section 128.7 sanctions against Petitioners and their counsel. (JA 215-276.) On April 19, 1996, after hearing, the trial court imposed the requested sanctions against Petitioners

and entered judgment dismissing their petition because it was "barred by the doctrine of *res judicata*; the petition is moot; Petitioners have unclean hands; and California Code of Regulations section 13188, subdivision (b) is not mandatory." (JA 338-339.)

On June 19, 1996, Petitioners appealed the above judgment. (JA 342-343.) On April 8, 1997, the California Court of Appeal affirmed in an unpublished opinion the dismissal, basing its decision solely on the unclean hands doctrine. (Pet., App. A.) After the California Supreme Court denied their petition for review, Petitioners filed the instant petition for writ of certiorari.

D. Bogart's Federal Habeas Petition

Petitioner Bogart also filed a separate petition for a writ of habeas corpus pursuant to 28 U.S.C. section 2254 in the United States District Court for the Central District of California on July 16, 1996. (Ex. A to Coastal Commission's Motion for Judicial Notice, at p. 3.)[1] As the District Court noted, Bogart sought "to challenge the underlying judgment in the civil case" which included the "permanent injunction that required [Bogart] to rescind each of the illegal sales of deed restricted lots and to make monetary restitution to the innocent third party purchasers." (*Id.* at pp. 4-5.) The Coastal Commission moved to dismiss the petition, arguing that dismissal was proper because Bogart was not in custody and he was a fugitive. (*Id.* at p. 6.) On October 25, 1996, the District Court

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[1] By order dated December 12, 1996, the California Court of Appeal granted the Coastal Commission's motion.

agreed with the Coastal Commission and also held that the petition was barred by additional grounds, including the abstention and exhaustion doctrines. (*Id.* at pp. 8-13.) On February 21, 1997, the United States Court of Appeals for the Ninth Circuit denied Bogart's request for a certificate of appealability, finding that he "has not made a substantial showing of the denial of a constitutional right." (Ex. A to Coastal Commission's Answer to Petition for Review by California Supreme Court filed below on June 5, 1997.)

ARGUMENT

Under California law, it is settled that equitable principles govern the issuance of a writ of mandate. (*Henneberque v. City of Culver City*, 172 Cal.App.3d 837, 843, 218 Cal.Rptr. 704 (1985); *see also* 8 Witkin, *California Procedure: Extraordinary Writs*, § 153, p. 950 (4th ed. 1997).) As noted above, not only has the Los Angeles Superior Court found that Petitioners knowingly and intentionally violated the Coastal Act, the court has also held Petitioners in contempt of court on three separate occasions for their unexcused refusal to comply with the court's permanent injunction, resulting in the issuance of a bench warrant for Petitioner Bogart's arrest. (JA 314-316.)

Indeed, in the first of three contempt orders, the trial court explicitly found that Petitioner Bogart and his sham corporations "have acted in *bad faith* in respect to their purported attempts to comply with the permanent injunction as shown by the declaration of Peter D. Bogart filed herein on or about November 16, 1994." (JA 315,

emphasis added.) Based on these facts, the trial court sustained the Coastal Commission's demurrer to Bogart's writ petition because he and his corporations "have unclean hands." (JA 346.) The California Court of Appeal agreed, holding in relevant part:

> "Unclean hands is an equitable doctrine that bars relief to a litigant 'who has violated conscience, good faith or other equitable principles in his prior conduct.' The doctrine has long been held applicable to proceedings for extraordinary writs, including writs of mandate. . . . We [have] stated that a party cannot seek the aid of a court 'while he stands in an attitude of contempt to its legal orders and processes,' and therefore that the petitioner could not 'invoke the process of this court so long as he thus continues to be in contempt of the superior court.' " (Pet., App. A at pp. A-7 to A-8, citations omitted.)

With this legal backdrop, the California Court of Appeal found that Petitioner Bogart and his corporations "violated the superior court's injunction in *Ojavan II*, and were found in contempt for it [and] [t]here is no indication that they have purged themselves of that contempt, or had done so at the time of the ruling below." (Pet., App. A at p. A-8.) Thus, the appellate court correctly held: "While occupying that position [of contempt] with respect to the superior court's directive to rectify their violations that engendered the cease and desist order, plaintiffs were equitably disentitled to seek relief from that court with regard to that order." (*Ibid.*)

Petitioners contend that the unclean hands doctrine should not be applied here because they "are merely

attempting to be allowed to exercise their first amendment rights to address a governmental entity in the time, place and manner specifically mandated by state statute for such an address. . . . " (Pet. at pp. 15-16.) In making this point, Petitioners rely upon case law that actually supports the decision of the state court. In *Shondel v. McDermott*, 775 F.2d 859 (7th Cir. 1985), the court *approved* the use of the unclean hands doctrine in intellectual property cases:

> "If . . . plaintiff who had acquired a patent in violation of antitrust limitations on patent pooling brought a suit to enjoin another from using the patent, the injunction would be refused on the ground that awarding it would assist in a violation of the antitrust laws. Similarly, the owner of a trademark that was itself misleading . . . could not get an injunction against the infringement of his mark." (*Shondel v. McDermott, supra*, 775 F.2d at 868.)

The reasoning in *Shondel* fully supports the state court's application of the unclean hands doctrine to bar Petitioners from seeking equitable relief when they have refused to do equity as required under the trial court's permanent injunction. Furthermore, the relief sought by Petitioners is inexorably intertwined with their contemptuous conduct: both the Coastal Commission's cease and desist order and the trial court's permanent injunction arose from Petitioners' illegal purchases and subsequent sales of deed restricted lots. Thus, the state court properly decided not to compel the Coastal Commission to revisit the cease and desist order because doing so would have rewarded Petitioners despite their contemptuous conduct. The First Amendment simply does not support

Petitioners' attempts to force the courts to revisit shop-worn and failed arguments. (*Funfar v. Superior Court*, 107 Cal.App. 488, 490 (1930) (writ petition properly dismissed on demurrer where petitioner guilty of contempt of court order in same action).)

Even if the First Amendment is somehow implicated in this case, the state court nonetheless acted within its discretion to bar Petitioners' suit under the unclean hands doctrine. For example, the court in *Shondel* cites *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968),[2] noting that *in pari delicto* equitable defenses may not be used to thwart private antitrust actions whose thrust is to enjoin in their entirety an anticompetitive scheme. This Court in *Perma Life* held that such defenses threaten the effectiveness of private antitrust actions which are a vital means for enforcing antitrust policy of the United States. (*Id.* at 138.) The Court premised its decision on the fact that the antitrust plaintiffs' "participation [in the allegedly anticompetitive scheme] was not voluntary in any meaningful sense" because plaintiffs were "attempt[ing] to make the best of a bad situation. . . . " (*Id.* at 138-141.) In the case at bar, Petitioners cannot claim that the Coastal Commission coerced them to violate the Coastal Act, prevented them from posting a bond to stay the injunction, drove them to violate the injunction, or compelled them into contempt. Disallowing the unclean hands defense under these circumstances would thwart the goals of the Coastal Act, undermine the state court's authority to enforce its own

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[2] Overruled on other grounds in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 755-756 (1984).

lawful orders, and reward Petitioners for their illegal and contemptuous activities.

Furthermore, if Petitioners truly wished to initiate out-of-court settlement discussions as they assert in their petition, they could have done so long ago by making an opening offer which the Attorney General would then have presented to the Coastal Commission as required by rule 3-510(A)(2) of the California Rules of Professional Conduct.[3] Alternatively, Petitioners have not and are not prevented from taking advantage of the Coastal Commission's public comment period, at the Commission's monthly meetings, where all members of the public may speak to the Commission on any matter relevant to the coastal zone. (*See* Coastal Commission's Answer to Petition for Review by California Supreme Court filed below on June 5, 1997, at p. 18.) Thus, rather than follow a constructive course of settlement negotiations, Petitioners instituted a half dozen actions against the Coastal Commission and Commission staff and counsel, resulting in a complete rejection of their theories. In the face of three contempt orders and a bench warrant for Petitioner Bogart's incarceration, Petitioners steadfastly refuse to comply with the injunction, thus preventing reimbursement to the defrauded third parties. This unexcused refusal to comply with the injunction demonstrates anything but a settlement mindset.

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[3] "A member [of the California Bar] shall promptly communicate to the member's client: . . . All amounts, terms, and conditions of any written offer of settlement made to the client. . . . " (Rules of Prof. Conduct 3-510(A)(2).)

In sum, Petitioners' First Amendment argument is nothing more than a sham. The state court properly held that Petitioners' writ petition is barred by the unclean hands doctrine.

CONCLUSION

The record in this and the related litigation is replete with examples of Petitioners' numerous and frivolous legal challenges to the Coastal Commission's enforcement of valid permit conditions. These challenges, however, have been bereft of sound legal authority or proper analysis of the facts. Furthermore, in the instant action, Petitioners present no grounds for review because the state court's application of the unclean hands doctrine to bar relief is based on well-established equitable principles. Petitioners' embrace of the First Amendment is nothing more than a ruse. Based on the above arguments and the undisputed record, the Coastal Commission respectfully requests that this Court deny the petition.

DATED: November 4, 1997.

Respectfully submitted,

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